

Ropers Majeski Kohn & Bentley
A Professional Corporation
Redwood City

PAMELA E. COGAN (SBN 105089)
KATHRYN C. CURRY (SBN 157099)
JENNIFER A. WILLIAMS (SBN 244707)
ROPER, MAJESKI, KOHN & BENTLEY
1001 Marshall Street
Redwood City, CA 94063
Telephone: (650) 364-8200
Facsimile: (650) 780-1701
Email: pcogan@ropers.com
kcurry@ropers.com
jwilliams@ropers.com

Attorneys for
McKESSON CORPORATION
EMPLOYEES' LONG TERM DISABILITY
BENEFIT PLAN and LIBERTY LIFE
ASSURANCE COMPANY OF BOSTON

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MICHAEL CREMIN,

Plaintiff,

v.

McKESSON CORPORATION
EMPLOYEES' LONG TERM
DISABILITY BENEFIT PLAN;

Defendant.

LIBERTY LIFE ASSURANCE
COMPANY OF BOSTON

Real Party In Interest.

CASE NO. C 07-1302 CW

**DEFENDANT AND REAL PARTY IN
INTEREST'S REQUEST FOR JUDICIAL
NOTICE IN SUPPORT OF CROSS
MOTION FOR JUDGMENT**

Date: June 19, 2008
Time: 2:00 p.m.
Dept.: Courtroom 2, 4th Floor

Judge: Honorable Claudia Wilken

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Pursuant to the Rule 201 of the Federal Rules of Evidence, defendant McKesson Corporation Employee's Long Term Disability Benefit Plan and Real Party in Interest Liberty Life Assurance Company of Boston hereby notify all parties that they will request the Court to

1 take judicial notice of the following papers, pleadings, records and other documentation on file in
2 the Northern District of California, including, but not limited to the following:

3 1. Plaintiff's Complaint for Declaratory Relief filed in the underlying action Cremin
4 v. McKesson Corporation Employees' Long Term Disability Benefit Plan, et al., Case No. C04-
5 04394 EDL. A true and correct copy is attached hereto as Exhibit 1.

6 2. The Court's Order Denying Plaintiff's Motion for Judgment, Denying Defendant's
7 Cross-Motion, and Remanding Case to Plan Administrator entered on December 21, 2005 in
8 Cremin v. McKesson Corporation Employees' Long Term Disability Benefit Plan, et al., Case No.
9 C04-4394 CW. A true and correct copy is attached hereto as Exhibit 2.

10 This request is made on the ground that the above opinions are capable of accurate and
11 ready determination by resort to sources whose accuracy cannot reasonably be questioned
12 pursuant to Federal Rules of Evidence, Rule 201. The request is also proper under Rule 201,
13 because a court may take judicial notice of its own records and documents that are public records
14 and capable of accurate and ready confirmation by sources that cannot reasonably be questioned.
15 (Wible v. Aetna Life Ins. Co., 375 F. Supp. 2d 956, 965-966 (C.D. 2005); See also, MGIC Indem.
16 Corp. v. Weisman, 803 F.3d 500, 504 (9th Cir. 1986) (courts may take judicial notice of matters
17 of public record outside the pleadings); United States v. Wilson, 631 F.2d 118, 119 (9th Cir.
18 1980) ("In particular, a court may take judicial notice of its own records in other cases, as well as
19 the records of an inferior court in other cases.").)

Ropers Majeski Kohn & Bentley
A Professional Corporation
Redwood City

1 Dated: May 12, 2008

ROPERS, MAJESKI, KOHN & BENTLEY

2
3 By: Kathryn C. Curry

4 PAMELA E. COGAN
5 KATHRYN C. CURRY
6 JENNIFER A. WILLIAMS
7 Attorneys for
8 McKESSON CORPORATION
9 EMPLOYEES' LONG TERM
10 DISABILITY BENEFIT PLAN and
11 LIBERTY LIFE ASSURANCE
12 COMPANY OF BOSTON
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A Professional Corporation
Redwood City

EXHIBIT 1

1 THORNTON DAVIDSON #166487
2 Thornton Davidson & Associates
3 2055 San Joaquin Street
4 Fresno, CA 93721
5 Telephone: (559)256-9800
6 Telefax: (559)256-9791

7 Attorney for Plaintiff

E-filing

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RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

8 U.S. DISTRICT COURT OF CALIFORNIA, NORTHERN DISTRICT
9 (SAN FRANCISCO DIVISION)

10 MICHAEL CREMIN,
11 Plaintiff,

12 vs.

13 McKESSON CORPORATION
14 EMPLOYEES' LONG TERM DISABILITY
15 BENEFIT PLAN,

16 Defendant

Case No.:

C 04 4394

**COMPLAINT FOR DECLARATORY
RELIEF**

17 Plaintiff MICHAEL CREMIN ("PLAINTIFF") alleges as follows:

18 **JURISDICTION**

19 1. PLAINTIFF's claim for relief arises under the Employee Retirement Income
20 Security Act of 1974, as amended ("ERISA"), 29 U.S.C. section 1132(a)(1) and (3). Pursuant to
21 29 U.S.C. section 1331, this court has jurisdiction over this action because this action arises
22 under the laws of the United States of America. 29 U.S.C. section 1132(c)(1) provides for
23 federal district court jurisdiction of this action.

24 **VENUE/INTRADISTRICT ASSIGNMENT**

25 2. Venue is proper in the Northern District of California because the acts and
26 occurrences giving rise to PLAINTIFF's claim for relief took place in San Francisco, California
27 in that PLAINTIFF is and was a resident of San Francisco County, California, when
28 DEFENDANT terminated his long-term disability benefits. Therefore, 29 U.S.C. section
1132(e)(2) provides for venue in this court in the San Francisco Division.

COMPLAINT FOR DECLARATORY RELIEF - 1

PARTIES

3. PLAINTIFF is, and at all times relevant hereto was, a participant, as that term is defined by 29 U.S.C. section 1000(7), of the McKESSON CORPORATION EMPLOYEES' LONG TERM DISABILITY BENEFIT PLAN ("The Plan") and thereby entitled to receive benefits there from. PLAINTIFF was a beneficiary because until his termination due to disability, he was an employee of McKesson Corporation, which established The Plan.

4. DEFENDANT The Plan is an employee welfare benefit plan organized and operating under the provisions of ERISA, 29 U.S.C. section 1001 et seq.

CLAIM FOR RELIEF

5. The Liberty Life Assurance Company of Boston insured the Plan and acted on behalf of the Plan in all matters alleged herein.

6. The Plan provides long-term disability benefits after an elimination period of 180 days, which, for a person under the age of 60 at the time the disability occurred, as was PLAINTIFF herein, such benefits potentially could continue until age 65.

7. In order to be eligible for benefits under the Plan, an employee must meet The Plan's definition of total disability. The Plan defines total disability, as follows:

"You are Totally Disabled if:

1. you are unable to perform the important duties of your own occupation on a Full-time or part-time basis because of Injury or Sickness that started while insured under the Group Policy; and
2. you do not work at all; and
3. you are receiving Doctor's Care. We will waive this requirement if We receive written proof acceptable to Us that further Doctor's Care would be of no benefit to you."

8. PLAINTIFF was employed by McKesson Corporation as a Director of Profitability Analysis.

9. PLAINTIFF became totally disabled and ceased to work on September 9, 1998.

1 10. PLAINTIFF remained disabled through the elimination period of the Plan, which
2 ended March 5, 1999.

3 11. PLAINTIFF applied for and was granted Long Term Disability ("LTD") benefits
4 from the Plan effective May 17, 1999.

5 12. PLAINTIFF also applied for Social Security Disability benefits. By letter dated
6 August 16, 1999 PLAINTIFF was awarded Social Security Disability benefits of \$1,455.80 per
7 month.
8

9 13. By letter dated September 21, 1999 The Plan demanded repayment of \$11,640 for
10 over-payment of Social Security Disability benefit payment. PLAINTIFF repaid the full amount.
11

12 14. The Plan acknowledged receipt of payment from PLAINTIFF of \$11,640 by letter
13 Dated December 1, 1999.

14 15. DEFENDANT is judicially and collaterally estopped to deny that PLAINTIFF is
15 totally disabled under The Plan because:
16

17 a. DEFENDANT required PLAINTIFF to apply for Social Security
18 Disability benefits.

19 b. PLAINTIFF did so, and was awarded such benefits.

20 c. Pursuant to the terms of The Plan, all such benefits, except COLA's were
21 paid or used to decrease DEFENDANT's obligation to PLAINTIFF.
22

23 16. By letter dated August 30, 2002 The Plan terminated benefits to PLAINTIFF,
24 giving 60 days to appeal the decision.

25 17. By letter dated October 30, 2002 PLAINTIFF timely appealed the Plan's
26 termination of his LTD benefits.

27 18. By letter dated December 6, 2002 the Plan notified PLAINTIFF that his appeal
28

1 was denied, and that PLAINTIFF had exhausted his administrative rights.

2 19. At all times mentioned herein PLAINTIFF was, and continues to be totally
3 disabled under the terms of The Plan.

4 20. This Court is required to review the termination of PLAINTIFF's LTD
5 benefits de novo because:

6 A. The Plan does not unambiguously confer discretion on Plan fiduciaries to
7 determine benefits claims and construe Plan terms; and such discretion is
8 illegal.

9 B. Plan fiduciaries acted under an actual conflict of interest at the time they
10 terminated PLAINTIFF's benefits:

11 i. They changed their position without receipt of new evidence.

12 ii. They determined material facts without supporting evidence.

13 iii. PLAINTIFF is informed and believes and thereon alleges that
14 claims staff is given financial incentives to deny or terminate
15 claims.

16 iv. The Plan has unfair claims handling procedures. When benefits
17 were terminated there was no notification to PLAINTIFF that he
18 could receive a copy of the Plan's documents regarding his claim
19 free of charge.

20 v. When benefits were terminated the Plan used an inconsistent
21 definition of disability than is in the summary plan description.

22 vi. When benefits were terminated there was no description given of
23 the Plan's review procedures and applicable time limits, including
24 a statement of PLAINTIFF's right to bring a civil action.

25 vii. PLAINTIFF is informed and believes and thereon alleges that Plan
26 fiduciaries relied upon an internal rule, standard or criterion to
27 terminate his benefits; however, when benefits were terminated he
28

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PAGE 7

1 was not advised that a copy of such internal rules, standards or
2 criterion would be provided free of charge to her upon request.

3 viii. The Plan utilized unfair appeal procedures:

4 a. PLAINTIFF was not notified that he had the right, free of
5 charge, to get copies of all documents relied upon to
6 terminate his benefits.

7 d. The Plan failed to consider all new evidence submitted on
8 appeal.

9 C. The Plan failed to take timely action on his appeal.

10 21. PLAINTIFF has exhausted all administrative remedies required to be exhausted
11 under the terms of The Plan.

12 22. The Plan's denial of PLAINTIFF's long-term disability benefits was arbitrary and
13 capricious, an abuse of discretion, and a violation of the terms of The Plan.

14 23. An actual controversy has arisen and now exists between PLAINTIFF and The
15 Plan with respect to whether PLAINTIFF is entitled to long-term disability benefits under the
16 terms of The Plan.

17 24. PLAINTIFF contends, and The Plan disputes, that PLAINTIFF is entitled to
18 benefits under the terms of The Plan for long-term disability because PLAINTIFF contends, and
19 DEFENDANT The Plan disputes, that PLAINTIFF is totally disabled.

20 25. PLAINTIFF desires a judicial determination of his rights and a declaration as to
21 which party's contention is correct, together with a declaration that The Plan is
22 obligated to pay long-term disability benefits, under the terms of The Plan,
23 retroactive to the first day of his
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1 eligibility, until and unless such time that PLAINTIFF is no longer eligible for such benefits
2 under the terms of The Plan.

3 26. A judicial determination of these issues is necessary and appropriate at this time
4 under the circumstances described herein in order that the parties may ascertain their respective
5 rights and duties, avoid a multiplicity of actions between the parties and their privities, and
6 promote judicial efficiency.
7

8 27. As a proximate result of DEFENDANT's wrongful conduct as alleged herein,
9 PLAINTIFF was required to obtain the services of counsel to obtain the benefits to which he is
10 entitled under the terms of the Plan. Pursuant to 29 U.S.C. section 1132(g)(1), PLAINTIFF
11 requests an award of attorney's fees and expenses as compensation for costs and legal fees
12 incurred to pursue PLAINTIFF's rights under the terms of The Plan.
13

14 WHEREFORE, PLAINTIFF prays judgment as follows:

15 1. For declaratory judgment against DEFENDANT The Plan, requiring The Plan to
16 pay long-term disability benefits under the terms of The Plan to PLAINTIFF for the period to
17 which he is entitled to such benefits, with prejudgment interest on all unpaid benefits, until
18 PLAINTIFF attains the age of 65 years or until it is determined that PLAINTIFF is no longer
19 eligible for benefits under the terms of The Plan.
20

21 2. For attorney's fees pursuant to statute.
22

23 3. For costs of suit incurred.
24

25 4. For such other and further relief as the Court deems just and proper.
26

27 Dated: October 12, 2004

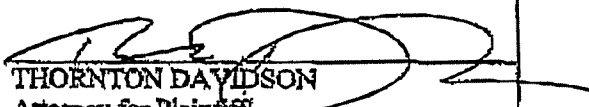
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THORNTON DAVIDSON
Attorney for Plaintiff
MICHAEL CREMIN

EXHIBIT 2

1
2 IN THE UNITED STATES DISTRICT COURT
3 FOR THE NORTHERN DISTRICT OF CALIFORNIA

4 MICHAEL CREMIN,

5 Plaintiff,

6 v.

7 MCKESSON CORPORATION EMPLOYEES' LONG
8 TERM DISABILITY BENEFIT PLAN and
9 LIBERTY LIFE ASSURANCE COMPANY OF
BOSTON,

10 Defendants.

No. C 04-4394 CW

ORDER DENYING
PLAINTIFF'S
MOTION FOR
JUDGMENT, DENYING
DEFENDANT'S
CROSS-MOTION, AND
REMANDING CASE TO
PLAN
ADMINISTRATOR

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12
13 Plaintiff Michael Cremin moves the Court, pursuant to Federal
14 Rule of Civil Procedure 52, for review of Defendant Liberty Life
15 Assurance Company's¹ termination of his long-term disability
16 benefits. Defendant opposes the motion, and cross-moves for
17 judgment in its favor. The matter was heard on December 2, 2005.
18 Having considered the parties' papers, the evidence cited therein
19 and oral argument on the motions, the Court DENIES the parties'
20 motions for judgment, but GRANTS Defendant's motion in the
21 alternative to remand the case to the Plan Administrator for
22 further consideration.

23 BACKGROUND

24 The following facts are taken from the administrative record,
25 McGee Decl., Ex. C, unless otherwise noted. Plaintiff began

26
27 ¹ On January 5, 2005, the Court approved a stipulation
28 substituting Defendant Liberty Life Assurance Company for Defendant
McKesson Corporation Employees' Long Term Disability Benefit Plan
(McKesson Plan), and dismissing the claims against McKesson Plan.

United States District Court
For the Northern District of California

1 working for McKesson Corporation in 1980. At all times relevant to
2 this action, Plaintiff was covered by the McKesson Plan, which is a
3 benefits plan organized under the Employee Retirement Income
4 Security Act (ERISA).

5 Plaintiff suffered a heart attack in 1988. Ten years later,
6 on January 23, 1998, Plaintiff was placed on short-term disability
7 by his cardiologist, Dr. Gershengorn, due to an unspecified cardiac
8 condition. Dr. Gershengorn initially recommended that Plaintiff
9 take a two week break, return to work part-time for two or three
10 weeks, and then be reassessed. CF-0490.

11 Plaintiff returned to work on February 10, 1998, but worked
12 only part-time until September 21, 1998, when he filed a claim for
13 long-term disability benefits. On the long-term disability claim
14 form, Plaintiff listed his disabling conditions as coronary artery
15 disease and anxiety; the claim form identified both Dr. Gershengorn
16 and Plaintiff's psychiatrist, Dr. Karalis.² According to the
17 physician's statement completed by Dr. Karalis, Plaintiff suffered
18 from severe anxiety disorder. Dr. Karalis defined his physical
19 impairment as Class 5: "severe limitation of functional capacity:
20 incapable of minimum (sedentary) activity." At the time Plaintiff
21 applied for long-term disability benefits, the McKesson Plan was
22 self-funded by the McKesson Corporation and administered by
23 Preferred Works.

24

25 ²Research conducted by Defendant shows that the Medical Board
26 of California put Dr. Karalis on probation, which was completed on
27 June 9, 1998. He also resigned, with charges pending, from the
State Bar of California, after serving five years' probation for
Medicaid fraud.

28

1 Preferred Works awarded Plaintiff long-term disability
2 benefits on April 20, 1999. The approval letter stated that
3 Plaintiff would receive long-term benefits for twenty-four months,
4 and would thereafter continue to receive benefits if Plaintiff
5 (1) could prove by "objective medical evidence" that he was unable
6 to perform any occupation for which he was reasonably qualified,
7 and (2) was receiving Social Security disability benefits. On
8 August 16, 1999, the Social Security Administration granted
9 Plaintiff disability benefits, effective retroactively from
10 January, 1999.

11 The McKesson Plan defines "disability" as follows:

12 "Disability" shall mean any physical or mental condition
13 arising from an illness, pregnancy or injury which renders a
14 Participant incapable of performing work. During the first
15 thirty (30) months of Disability, a Participant must be unable
16 to perform the work of his or her regular occupation or any
17 reasonably related occupation, and must not, except as
18 provided in Section 3.4, be performing work or services of any
19 kind for remuneration. After thirty (30) months of
20 Disability, a Participant must be unable to perform the work
21 of any occupation for which he or she is or becomes reasonably
22 qualified by training, education or experience, and, in
23 addition, be receiving Social Security benefits on account of
24 his or her disability.

25 Effective January 1, 2000, McKesson Corporation became wholly
26 insured by Defendant, and Defendant became responsible for both the
27 funding and administration of the McKesson Plan.

28 Dr. Gershengorn's office notes and tests results date back to
January, 1997. In early 1997, Dr. Gershengorn noted that Plaintiff
was "feeling pretty well," with back and hip pain but no chest
pain. On June 27, 1997, Dr. Gershengorn noted that Plaintiff "uses
Xanax for sleep." CF-484.

On December 4, 2001, Dr. Gershengorn submitted to Defendant a

1 physical capacities form which stated that Plaintiff was physically
2 capable of sitting up to eight hours, with breaks. CF-269. He
3 also checked a box indicating that Plaintiff could "work 8 hours
4 per workday." Id. In May, 2002, in response to a request from
5 Defendant for updated medical information, Dr. Gershengorn
6 submitted office notes which indicated that, among other things,
7 Plaintiff was still taking Xanax as recently as May 8, 2001.
8 According to an August 12, 2002, update from Dr. Gershengorn,
9 Plaintiff suffered from coronary heart disease, he was permanently
10 restricted in all functional activities other than sitting, and his
11 estimated return to work date was "unknown." CF-169.

12 According to forms regularly submitted by Dr. Karalis between
13 September, 1998 and May, 2000, Plaintiff suffered from anxiety
14 disorder and was "totally disabled." Dr. Karalis' initial notes of
15 September 10, 1998, near the end of Plaintiff's part-time work
16 experience, indicate that Plaintiff said that he had
17 psychologically deteriorated over the year, that he couldn't "work
18 those long hours at McKesson," and that he felt he was "pushing
19 himself into another heart attack." CF-499. The documentation
20 indicates that Dr. Karalis provided Plaintiff with supportive
21 psychotherapy, on an as-needed basis, but that Plaintiff took
22 cardiac medications only. CF-0301, 0303. According to a March 20,
23 2001 form, Dr. Karalis indicated that Plaintiff's psychiatric
24 condition had "not worsened" during his treatment, but that
25 Plaintiff could do "no work at all." CF-0281. At that point, Dr.
26 Karalis described Plaintiff's Axis V Global Assessment of

1 Functioning (GAF) as 45.³ Dr. Karalis revised Plaintiff's
2 estimated date to return to work to "never." CF-0279. On February
3 13, 2002, Dr. Karalis told Defendant that he had last seen
4 Plaintiff on February 2, 2002; that Plaintiff remained totally
5 disabled due to anxiety disorder; that Plaintiff's prognosis
6 remained poor; and that Plaintiff could not return to work. Dr.
7 Karalis' office notes further indicate that he had contact with
8 Plaintiff on February 5, 2002, April 11, 2002, May 22, 2002, and
9 August 6, 2002. On each occasion, Dr. Karalis noted that he
10 provided supportive therapy to Plaintiff. In his February 5, 2002
11 note, Dr. Karalis stated "GAF remains 45."⁴

12 In a May 5, 2000 questionnaire, Plaintiff stated that he
13 could, among other activities, drive his car, occasionally go
14 grocery shopping, and visit friends' houses. He stated that he was
15 not able to participate in an exercise program such as aerobics,
16 that he had difficulty sleeping at night, and that he sometimes
17 took a nap during the day for one to four hours. On February 4,
18 2002, Plaintiff filled out a similar, updated activities
19 questionnaire. At that point, he stated he could drive for short

20
21 ³Plaintiff asks the Court to take judicial notice of an
22 excerpt from the American Psychiatric Association's Diagnostic and
23 Statistical Manual of Mental Disorder, Fourth Edition DSM-IV-TR,
24 which describes the GAF scale between 41 and 50 as "Serious
25 symptoms (e.g., suicidal ideation, severe obsessional rituals,
26 frequent shoplifting) OR any serious impairment in social,
27 occupational, or school functioning (e.g., no friends, unable to
28 keep a job)." The Court grants the unopposed request for judicial
notice.

26 ⁴Defendant attempts to dismiss the recent GAF rating as
27 "inadmissible hearsay, unsupported, speculative, and improper
28 expert opinion." Defendant fails to show that Dr. Karalis' opinion
as Plaintiff's treating psychiatrist is inadmissible.

1 periods of time, and left his house several times per week.
2 However, he reported that he could not participate in an exercise
3 program, was able to sit only one hour per day, and that his daily
4 routine involved fourteen hours in bed or watching television, in
5 addition to a two hour nap. According to Defendant's notes from a
6 February 7, 2002 phone call, Plaintiff reported that he had "hurt
7 his ankle and torn some ligaments due to exercise he needs to do."
8 CF-0015.

9 Defendant began a review of Plaintiff's claim file on March 9,
10 2002. Susan Leonardos, a registered nurse, conducted the initial
11 review. According to her notes, Dr. Karalis told her on August 7,
12 2002 that he had not seen Plaintiff since February, 2002 (contrary
13 to his records of visits in April and May), that he was "not saying
14 that [Plaintiff] cannot RTW [return to work]," and that he agreed
15 that Plaintiff "may well have a sedentary capacity." CF-0175.
16 When Nurse Leonardos asked why Plaintiff was not prescribed anti-
17 depressant or anti-anxiety medication, Dr. Karalis reportedly told
18 her that he did not do so because of Plaintiff's cardiac condition,
19 but that Plaintiff had "improved overall," that he was seen "only"
20 "every few" months, and that he had "never been in therapy." CF-
21 180. After Nurse Leonardos concluded that there was no objective
22 evidence from Dr. Karalis to support a finding that Plaintiff was
23 incapable of sedentary functional activity, Defendant ordered
24 surveillance of Plaintiff. On Thursday, March 28, Friday, March
25 29, and Saturday, March 30, Plaintiff was twice seen leaving his
26 house, once to go to the store and once to drive to an
27 acquaintance's house, and was once seen retrieving an object from
28

1 his car.

2 On August 30, 2002, Defendant sent Plaintiff a letter stating
3 that his long-term disability benefits had been terminated. The
4 letter indicated that Defendant had determined that Plaintiff was
5 capable of sedentary work, relying in part upon the functional
6 limitations form completed on August 12, 2002 by Dr. Gershengorn.
7 Defendant also stated that its determination was based in part upon
8 Nurse Leonardos' opinion that "there is not enough information to
9 support lack of function from a psychiatric perspective. The
10 claimant sees the psychiatrist sporadically and is on no
11 psychiatric medication." The termination letter stated that
12 Plaintiff could perform the following sedentary jobs: financial
13 analyst, budget analyst, economist, and credit analyst.

14 In a letter dated October 10, 2002, Plaintiff appealed the
15 termination of his benefits. The October 10 letter also requested,
16 among other things, copies of the surveillance tapes that Defendant
17 had made of Plaintiff. Plaintiff also sent Defendant a October 18,
18 2002 letter from Dr. Karalis in which the psychiatrist expressed
19 his disagreement with the termination of benefits. Specifically,
20 Dr. Karalis stated that it appeared that Defendant had terminated
21 Plaintiff's disability benefits based solely upon the August 12,
22 2002 physician's statement from Dr. Gershengorn which indicated
23 that Plaintiff was not restricted from sitting for eight hours,
24 although he was restricted in all other physical activities. Dr.
25 Karalis reported the October 15, 2002 administration of Zung

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27

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1 Depression and Anxiety Psychological Tests⁵; the results showed, in
2 part, that Plaintiff felt more nervous and anxious than usual, that
3 he felt weak or tired easily, that he got tired for no reason, that
4 he had some loss of mental clarity, and that he did not find it
5 easy to make decisions. Dr. Karalis opined that, given the
6 exertional restrictions imposed by Dr. Gershengorn, Plaintiff could
7 not work; he elaborated,

8 In my experience, patients who attempt job reentry in jobs
9 allowing only "sitting" do not do well, since sitting becomes
10 uncomfortable and there is often (as with you) an ongoing
psychological impairment (concentrating, remembering,
analyzing, etc.--commonly called cognitive functions).

11 CF-0141. Dr. Karalis further stated that Plaintiff could not
12 perform the sedentary jobs recommended by Defendant because
13 Plaintiff did "not possess the stabilization of moods and control
14 of psychiatric symptomatology required to have predictably stable
15 cognitive functioning to perform these jobs, which assume full
16 cognitive functioning." CF-0143.

17 Defendant conducted further daily surveillance of Plaintiff
18 from November 6 through November 10, 2002. Over the course of
19 those five days, Plaintiff was observed leaving his residence only
20 three times: once to retrieve a newspaper on the curbside, once to
21 drive to the store, and once to drive to an unknown location. At
22 one point, Plaintiff left his car parked partially in a lane of

23

24 ⁵Dr. Mirkin, hired by Defendant to review Plaintiff's file,
25 states that the Zung test is a self-rating scale that can be used
26 to assess progress over time, but which "is not a diagnostic tool
27 and certainly not one that should be used to resolve a dispute as
to the valid presence of symptoms because there is no objective
validity scale built into the inventory questions." CF-0114.
Plaintiff does not dispute this statement.

28

United States District Court
For the Northern District of California

1 traffic.

2 Plaintiff called Defendant on November 21, 2002 and informed a
3 representative that his cardiologist, Dr. Gershengorn, also
4 disagreed with Defendant's decision to terminate his benefits and
5 would be submitting a letter to that effect. Also in November,
6 Defendant initiated a review by psychiatrist Dr. Mirkin of the
7 information in Plaintiff's file. On November 30, 2002, Dr. Mirkin
8 submitted a report that, under the heading "Recommendations and
9 Conclusions," criticized Dr. Karalis' treatment and opinions, on
10 the grounds that: (1) the psychiatric information supporting
11 Plaintiff's disability was subjective only, and his condition
12 should have been treated more aggressively, e.g. with medication,
13 if it was as debilitating as Dr. Karalis claimed; (2) there was no
14 indication of imminent threat from Plaintiff's cardiac disease, and
15 if Plaintiff displayed abnormally cautious behavior, Dr. Karalis
16 should have treated it more aggressively; (3) Dr. Karalis' office
17 notes are very brief, and fail to support his medical conclusion of
18 total disability for Plaintiff and his specific opinion that
19 Plaintiff lacked the cognitive functioning to work; and (4) there
20 was no indication from the record why Plaintiff suddenly became so
21 concerned about another heart attack.

22 In a December 4, 2002 letter to Defendant, Dr. Gershengorn
23 stated that, while he did report the functional limitations cited
24 in Defendant's original termination decision letter, Plaintiff also
25 had limitations on non-exertional activities such as "structured
26 schedules, deadlines, adversarial relationships, and commuting to
27 work." CF-85. Dr. Gershengorn further stated as follows: "He

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1 remains on cardiac medications . . . and Xanax, and he remains in
2 therapy for his anxiety disorder. I am unaware of any dramatic
3 improvement in Mr. Cremin's medical condition that warrants
4 reversal of the previous decision, which found him to be disabled."
5 Id.

6 On October 18, 2004, Plaintiff filed a complaint for
7 declaratory judgment that he is entitled to long-term disability
8 benefits under the McKesson Plan.

9 In its October 3, 2005 order addressing the issue of the
10 standard of review, the Court found that Plaintiff had submitted
11 material, probative evidence that Defendant had an actual conflict
12 of interest when it terminated Plaintiff's benefits. Among other
13 factors, the Court found that Dr. Mirkin's report was "little more
14 than an incomplete critique of Dr. Karalis' treatment plan," which
15 Plaintiff did not have the opportunity to view and address. Oct.
16 3, 2005 Order at 15.

17 LEGAL STANDARD

18 ERISA provides Plaintiff with a federal cause of action to
19 recover the benefits he claims are due under the Plan. 29 U.S.C.
20 § 1132(a)(1)(B). The standard of review of a plan administrator's
21 denial of ERISA benefits depends upon the terms of the benefit
22 plan. In its October 3, 2005 order, the Court determined that
23 Defendant's termination of Plaintiff's benefits would be reviewed
24 de novo. Therefore, as explained by the Court at the February 18,
25 2005 case management conference, the Court conducts a bench trial
26 based on the administrative record in order to evaluate Plaintiff's
27 claim. Kearney v. Standard Ins. Co., 175 F.3d 1084, 1094-95 (9th

1 Cir. 1999) (en banc), cert. denied, 528 U.S. 964 (1999).

2 In its de novo review of Defendant's decision to deny
3 benefits, the Court must decide whether Plaintiff is disabled under
4 the terms of the plan. In Juliano v. Health Maintenance
5 Organization of New Jersey, Inc., 221 F.3d 279, 287-8 (2nd Cir.
6 2000), the Second Circuit held that it was the plaintiffs' burden
7 "to establish that they were entitled to [the] benefit [sought]
8 pursuant to the terms of the Contract or applicable federal law."
9 Following Juliano, the Court concludes that Plaintiff must carry
10 the burden to prove that he was disabled under the meaning of the
11 plan. Sabatino v. Liberty Life Assur. Co., 286 F. Supp. 2d 1222,
12 1232 (N.D. Cal. 2003). On de novo review, the Court may weigh
13 contradictory evidence. Newcomb v. Standard Ins. Co., 187 F.3d
14 1004, 1007 (9th Cir. 1999).

15 "While under an abuse of discretion standard [the Court's]
16 review is limited to the record before the plan administrator, this
17 limitation does not apply to de novo review." Jebian v. Hewlett-
18 Packard Co. Employee Benefits Organization Income Protection Plan,
19 349 F.3d 1098, 1110 (9th Cir. 2003). The Court has discretion "to
20 allow evidence that was not before the plan administrator 'only
21 when circumstances clearly establish that additional evidence is
22 necessary to conduct an adequate de novo review.'" Kearney, 175
23 F.3d at 1090 (citations omitted); see also Mongeluzo v. Baxter
24 Travenol Long Term Disability Benefit Plan, 46 F.3d 938, 943 (9th
25 Cir. 1995) (On de novo review, "new evidence may be considered . .
26 . to enable the full exercise of informed and independent
27 judgment.").

DISCUSSION

I. Plaintiff's Evidence of Disability

As evidence that he is disabled, Plaintiff points to the following: (1) the opinions of his treating physicians, including Dr. Karalis' determination that Plaintiff had a GAF score of 45; (2) the Social Security Administration's determination that he was disabled; and (3) the results of Defendant's surveillance of Plaintiff.⁶ Defendant does not dispute that Plaintiff may have been disabled at some point in the past, but argues that this evidence is insufficient to prove that his disability continued until September 1, 2002, when Defendant discontinued benefits.

A. Dr. Gershengorn

Dr. Gershengorn's records show that Plaintiff is physically capable for sitting for eight hours, but is not capable of any other regular work activity. None of the evidence from the cardiologists' records suggests that sedentary work would, in itself, put Plaintiff at cardiac risk. However, Dr. Gershengorn's December 4, 2002 letter does state that Plaintiff "also has non-exertional limitations due to his medical conditions." Dr. Gershengorn opined that non-exertional activities "that could be harmful to him include structured schedules, deadlines, adversarial

⁶Plaintiff also points to Defendant's failure to conduct an independent psychiatric examination of him, alleged gaps and errors in Dr. Mirkin's review of Plaintiff's file, and Defendant's failure to solicit review of Dr. Mirkin's report from Drs. Karalis or Gershengorn. Although these factors were relevant to the Court's decision to apply a de novo standard of review, and may go to the weight of Dr. Mirkin's evidence, these alleged errors are not, in themselves, affirmative evidence that Plaintiff is disabled.

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1 relationships, and commuting to work."⁷ He also notes that "major
2 depression/anxiety has been shown to be the strongest predictor of
3 adverse outcome (MI, CABG, angioplasty) on patients with coronary
4 artery disease," although he renders no opinion on whether
5 Plaintiff in fact suffers from major depression or anxiety.

6 In the absence of any specific findings, direct observations
7 or diagnoses to the contrary, it appears that Dr. Gershengorn's
8 opinion regarding Plaintiff's non-exertional limitations is not
9 based directly on objective evidence. He may have been relying on
10 Dr. Karalis' diagnosis, or Plaintiff's self-reporting of anxiety.
11 Notably, Dr. Gershengorn does not actually say that Plaintiff
12 cannot work; instead, the cardiologist merely states that he is
13 "unaware of any dramatic improvement in Mr. Cremin's medical
14 condition that warrants reversal of the previous decision, which
15 found him to be disabled." Moreover, Plaintiff concedes that his
16 cardiac condition, standing alone, is not disabling. Pl.'s Reply
17 Br. 3. Therefore, even taking into consideration the December 4
18 letter, Dr. Gershengorn's records and opinions do not provide
19 sufficient, objective medical evidence to establish that Plaintiff

20

21 ⁷Defendant objects to the Court's consideration of Dr.
22 Gershengorn's letter, which was not before the plan administrator
23 when Plaintiff's benefits were terminated. However, the Court
24 finds that consideration of this opinion of Plaintiff's treating
25 physician is necessary in order to "enable the full exercise of
26 informed and independent judgment." Mongeluzo, 46 F.3d at 943.
27 The Court notes that Defendant was aware at the time it denied
28 Plaintiff's appeal that Dr. Gershengorn disagreed with Defendant's
denial of benefits. Furthermore, as the Court noted in its October
3, 2005 order, Plaintiff did not have the opportunity to view and
address Dr. Mirkin's report prior to Defendant's final decision
regarding his benefits; under these circumstances, Defendant's
objection to the letter are inconsistent and unfounded.

28

1 is disabled under the plan.

2 B. Dr. Karalis

3 The parties sharply dispute the significance of Dr. Karalis'
4 evidence. Nurse Leonardos' notes of her August, 2002 phone
5 conversation, in which Dr. Karalis allegedly told her that
6 Plaintiff had improved and might have functional capability,
7 contrast sharply with his previous, regular descriptions of
8 Plaintiff as totally disabled, as well as his October 18, 2002
9 letter opining that Plaintiff's cognitive impairments prevented him
10 from performing even a completely sedentary job. Defendant uses
11 this discrepancy to dismiss Dr. Karalis' February, 2002 GAF rating,
12 an objective test, as "irrelevant" because Dr. Karalis later told
13 Defendant that Plaintiff's condition had improved. The Court
14 cannot resolve the discrepancies between Nurse Leonardos' notes and
15 Dr. Karalis' later statements.

16 Nevertheless, Dr. Karalis' documentation contains little in
17 the way of objective assessment of Plaintiff's cognitive
18 impairments. The GAF result of 45 does provide some objective
19 evidence of Plaintiff's level of functioning, yet the rating, in
20 itself, shows that Plaintiff may not be able to work but not that
21 Plaintiff cannot work, because such an assessment may relate to
22 social rather than occupational functioning. Plaintiff does not
23 dispute Dr. Mirkin's opinion that the Zung tests, based on self-
24 reporting of anxiety and depression, are not an acceptable means to
25 reach an objective disability determination. Dr. Karalis did not
26 prescribe any medication for Plaintiff. Although apparently
27 Plaintiff was taking Xanax prescribed by Dr. Gershengorn, there is

1 no evidence in the record that Dr. Karalis was aware of this. Dr.
2 Karalis' notes and letter state that he gave Plaintiff "supportive
3 therapy," but nowhere does he describe the intensity, goals or
4 outcomes of that therapy in any detail.⁸ Dr. Karalis' credibility
5 is undermined by his suspension from the California State Bar for
6 Medicaid fraud. For these reasons, although Dr. Karalis' opinion
7 and GAF assessment provide some evidence in support of Plaintiff's
8 disability claim, the Court finds that Dr. Karalis' opinions are
9 not sufficiently persuasive to allow Plaintiff to meet his burden
10 of proof.

11 C. Surveillance Tapes

12 Plaintiff asserts that the surveillance tapes, which show a
13 generally low level of activity as well as poor driving skills,
14 support his claim of disability. The Court finds that the tapes,
15 while consistent with the claimed disability, are not, in
16 themselves, probative, objective medical evidence of disability.

17 D. Social Security Determination

18 The Social Security Administration's (SSA's) determination
19 that Plaintiff was disabled is a factor that weighs in Plaintiff's
20 favor. However, there are no substantive findings by the SSA
21 contained within the administrative record. And, although SSA
22 regulations generally require administrative law judges to give
23 deference to the opinions of a claimant's treating physician, such
24 special deference is not required in the ERISA context. Black &

25
26 ⁸Plaintiff's statement that Dr. Karalis initially provided
27 Plaintiff with "intensive" therapy is unsupported by the record.
At best, the evidence shows that the two spoke or met somewhat more
frequently earlier in their relationship.

1 Decker Disability Plan v. Nord, 538 U.S. 822, 829-30 (2003). Here,
2 much of Plaintiff's case rests on the credibility of his treating
3 physicians. Nevertheless, the Court finds that the SSA's
4 determination, at minimum, provides objective support for the
5 opinions of Plaintiff's treating physicians as of SSA's August,
6 1999 award of benefits. See Calvert v. Firestar Finance, Inc., 409
7 F.3d 286, 294 (6th Cir. 2005) (holding that SSA disability
8 determination supports conclusion that objective support existed
9 for treating physician's opinion).

10 Plaintiff further urges the Court to find that, having
11 required him to apply for Social Security benefits, Defendant is
12 now judicially estopped from arguing that he is not disabled under
13 the plan. Judicial estoppel is a doctrine which "precludes a party
14 from gaining an advantage by taking one position, and then seeking
15 a second advantage by taking an incompatible position." Rissetto
16 v. Plumbers & Steam Fitters Local 343, 94 F.3d 597, 600 (9th Cir.
17 1996). However, Defendant did not argue to the SSA that Plaintiff
18 was disabled, and Plaintiff has not shown that Defendant has taken
19 inconsistent positions. Furthermore, as the Court ruled in its
20 previous order in response to a similar argument by Plaintiff, the
21 SSA disability determination does not create an irrebuttable
22 presumption of disability under the plan because the SSA's
23 mandatory treating physician rule does not apply in the ERISA
24 context. October 3, 2005 Order at 14 (citing Black & Decker).

25 II. Defendant's Evidence of No Disability

26 Although Plaintiff's evidence of continued disability is weak,
27 Defendant does not persuasively rebut it. The purported

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1 inconsistencies identified by Defendant are overblown, or decrease
2 the weight of Plaintiff's evidence rather than demonstrate that
3 Plaintiff was not disabled as of September, 2002. For instance,
4 without additional information about the exercise that Plaintiff
5 told Defendant he needed to do but that resulted in a broken ankle,
6 there is no reason to think that it is necessarily inconsistent
7 with Plaintiff's earlier May 5, 2000 statement that he could not
8 participate in an exercise program such as aerobics. Nor is
9 Plaintiff's part-time employment status in 1998 persuasive evidence
10 that Plaintiff is not disabled. Nothing in the record reflects
11 Plaintiff's actual work performance during that time, and Plaintiff
12 subsequently ceased work altogether, with the support of his
13 doctors.

14 Dr. Mirkin's report is more thoroughly reasoned and supported
15 than the opinions of Dr. Karalis. As the Court found in its prior
16 order, however, Dr. Mirkin's report is at best an incomplete
17 critique of Dr. Karalis' opinions and treatment. Dr. Mirkin did
18 not examine Plaintiff or communicate directly with Plaintiff's
19 treating physicians; instead, he reviewed the scanty records. Dr.
20 Mirkin's opinion that Plaintiff should have been treated more
21 aggressively is persuasive, but it is equally susceptible to two
22 different interpretations: that Dr. Karalis erred in concluding
23 that Plaintiff could not work, because his depression and anxiety
24 is not that severe; or in the alternative, that Plaintiff does
25 suffer severe depression and anxiety, but that Dr. Karalis'
26 treatment was inadequate.

27

28

1 III. Remedy

2 In light of the gaps in the record, the Court finds it cannot
3 reach an adequately supported final adjudication of Plaintiff's
4 disability claim. Plaintiff has introduced some evidence of
5 disability, but it is not sufficient to meet his burden of proof.
6 Nevertheless, the Court has serious questions regarding Plaintiff's
7 level of impairment that render final judgment in Defendant's favor
8 inappropriate. Relatively minimal additional development of the
9 record could significantly assist a fact-finder. For instance, if
10 Dr. Karalis knew that Plaintiff took Xanax prescribed by Dr.
11 Gershengorn and relied on this in devising Plaintiff's psychiatric
12 treatment, this would alter the import of Dr. Mirkin's opinion.
13 Therefore, the Court concludes that the most appropriate course is
14 to remand Plaintiff's claim to the Plan Administrator for
15 additional investigation.

16 Plaintiff argues that Defendant's authority supporting remand
17 is inapposite. Both Gallo v. Amoco Corp., 102 F.3d 918 (7th Cir.
18 1996) and Miller v. United Welfare Fund, 72 F.3d 1066 (2nd Cir.
19 1995) involved a lower court's review under an "arbitrary and
20 capricious," standard, and thus are not directly applicable to this
21 de novo review. Yet even Plaintiff's authority, also involving
22 review under the arbitrary and capricious standard, suggests that
23 the Court has the authority to remand a case where, as here, the
24 facts are unclear. Cf. Grosz-Salomon v. Paul Revere Life Ins. Co.,
25 237 F.3d 1154, 1163 (9th Cir. 2001) (holding retroactive
26 reinstatement of benefits to be appropriate remedy where Plan
27 Administrator's decision "was simply contrary to the facts").

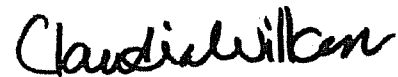
1 Therefore, the Court grants Defendant's motion for remand.

2 CONCLUSION

3 For the foregoing reasons, the Court DENIES Plaintiff's motion
4 for judgment (Docket No. 60) and GRANTS Defendant's cross-motion,
5 in the alternative, to remand Plaintiff's claim to the Plan
6 Administrator for further investigation (Docket No. 62). The case
7 will be closed, and the Clerk shall enter judgment in Defendant's
8 favor. Each party shall bear its own costs of the action.

9
10 IT IS SO ORDERED.

11
12 Dated: 12/21/05



13
14 CLAUDIA WILKEN
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1 periods of time, and left his house several times per week.
2 However, he reported that he could not participate in an exercise
3 program, was able to sit only one hour per day, and that his daily
4 routine involved fourteen hours in bed or watching television, in
5 addition to a two hour nap. According to Defendant's notes from a
6 February 7, 2002 phone call, Plaintiff reported that he had "hurt
7 his ankle and torn some ligaments due to exercise he needs to do."
8 CF-0015.

9 Defendant began a review of Plaintiff's claim file on March 9,
10 2002. Susan Leonardos, a registered nurse, conducted the initial
11 review. According to her notes, Dr. Karalis told her on August 7,
12 2002 that he had not seen Plaintiff since February, 2002 (contrary
13 to his records of visits in April and May), that he was "not saying
14 that [Plaintiff] cannot RTW [return to work]," and that he agreed
15 that Plaintiff "may well have a sedentary capacity." CF-0175.
16 When Nurse Leonardos asked why Plaintiff was not prescribed anti-
17 depressant or anti-anxiety medication, Dr. Karalis reportedly told
18 her that he did not do so because of Plaintiff's cardiac condition,
19 but that Plaintiff had "improved overall," that he was seen "only"
20 "every few" months, and that he had "never been in therapy." CF-
21 180. After Nurse Leonardos concluded that there was no objective
22 evidence from Dr. Karalis to support a finding that Plaintiff was
23 incapable of sedentary functional activity, Defendant ordered
24 surveillance of Plaintiff. On Thursday, March 28, Friday, March
25 29, and Saturday, March 30, Plaintiff was twice seen leaving his
26 house, once to go to the store and once to drive to an
27 acquaintance's house, and was once seen retrieving an object from
28

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1 his car.

2 On August 30, 2002, Defendant sent Plaintiff a letter stating
3 that his long-term disability benefits had been terminated. The
4 letter indicated that Defendant had determined that Plaintiff was
5 capable of sedentary work, relying in part upon the functional
6 limitations form completed on August 12, 2002 by Dr. Gershengorn.
7 Defendant also stated that its determination was based in part upon
8 Nurse Leonardos' opinion that "there is not enough information to
9 support lack of function from a psychiatric perspective. The
10 claimant sees the psychiatrist sporadically and is on no
11 psychiatric medication." The termination letter stated that
12 Plaintiff could perform the following sedentary jobs: financial
13 analyst, budget analyst, economist, and credit analyst.

14 In a letter dated October 10, 2002, Plaintiff appealed the
15 termination of his benefits. The October 10 letter also requested,
16 among other things, copies of the surveillance tapes that Defendant
17 had made of Plaintiff. Plaintiff also sent Defendant a October 18,
18 2002 letter from Dr. Karalis in which the psychiatrist expressed
19 his disagreement with the termination of benefits. Specifically,
20 Dr. Karalis stated that it appeared that Defendant had terminated
21 Plaintiff's disability benefits based solely upon the August 12,
22 2002 physician's statement from Dr. Gershengorn which indicated
23 that Plaintiff was not restricted from sitting for eight hours,
24 although he was restricted in all other physical activities. Dr.
25 Karalis reported the October 15, 2002 administration of Zung

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